No. 96-1688

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

DAVID M. SCHLESSINGER,

Petitioner,

vs.

GEORGE SALIMES, TOWN OF GENEVA, TOWN OF GENEVA BOARD, RICHARD PLOCH, Chairperson of the Board, RICHARD BEHOF, Member of the Board, KENNETH PIANTINO, Member of the Board, TOWN OF GENEVA POLICE DEPARTMENT, EDWARD GRITZNER, GEORGE CONDOS, ANTHONY'S STEAKHOUSE INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Was it reasonable for Officer Salimes to threaten to arrest David Schlessinger for "fraud on an innkeeper" or disorderly conduct when Schlessinger refused to pay for a meal he ordered and partially consumed, and his loud, obnoxious behavior disturbed other patrons of the restaurant?

2. Did the Seventh Circuit Court of Appeals properly exercise its discretion when it sanctioned David Schlessinger and his attorney pursuant to Fed. R. App. P. 38 and Seventh Circuit Rule 38, where the Seventh Circuit found that Schlessinger failed to cite relevant controlling case law; attempted to reargue facts on appeal; made unreasonable and irresponsible legal contentions; pursued an appeal at substantial and unwarranted costs to the respondents and the judicial system; and pursued an appeal which had no chance of success?

LIST OF INTERESTED PARTIES

The petitioner is David M. Schlessinger.

The respondents are correctly identified in the caption. Charles H. Bohl of Whyte Hirschboeck Dudek S.C. is counsel of record for all respondents. Charles H. Bohl and Kathryn M. West of Whyte Hirschboeck Dudek S.C. are counsel for respondents George Salimes, Town of Geneva Police Department and Edward Gritzner. Michael J. Cieslewicz and John K. Garofani of Kasdorf, Lewis & Swietlik, S.C. are counsel for respondents Town of Geneva, Town of Geneva Board, Richard Ploch, Richard Behof and Kenneth Piantino. Mary Beth Castino of Mohr & Anderson, S.C. is counsel for respondents George Condos and Anthony's Steakhouse.

Anthony's Steakhouse is a Wisconsin corporation. It has no parent company or subsidiaries.

Each of the respondents join in this Brief in Opposition.

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I

Respondents' request that the Court deny the Petition for Writ of Certiorari seeking review of an opinion of the United States Court of Appeals for the Seventh Circuit. The Court of Appeals opinion is reported at 100 F.3d 519 (1996). For the Court's convenience, all citations to the opinion will be to the opinion identified as Exhibit A in Schlessinger's Appendix to the Petition. The opinion of the United States District Court for the Eastern District of Wisconsin is not reported. For the Court's convenience, any citation to the District Court's opinion will be to the opinion identified as Exhibit D in Schlessinger's Appendix.

STATEMENT OF THE CASE

Schlessinger has identified the basis for his Petition as involving the issues of qualified immunity and the Seventh Circuit's decision that his appeal was frivolous and sanctionable. With respect to the qualified immunity issue, Schlessinger does not contend that the issues raised in the Petition are novel or involve unsettled questions of federal law. Rather, he harangues the Seventh Circuit for failing to consider "all relevant precedents" and disagrees with its determination of the facts. Throughout his argument, Schlessinger fails to recognize the simple precept that absent a constitutional violation, an analysis of qualified immunity is needless. Quite clearly, Schlessinger fails to acknowledge the dispositive finding of the Court that the threat of arrest was appropriate and no constitutional injury occurred.

Regarding the Seventh Circuit's determination that this appeal was frivolous, in a rather odd argument given the factual background of this case, Schlessinger contends that the panel of jurists were "personally embroiled" in the controversy and reached a biased decision. Despite Schlessinger's characterizations, this Petition represents nothing more than Schlessinger's continued refusal to acknowledge the factual and legal inadequacies of his complaint.

A. Procedural History

On October 14, 1994, Schlessinger filed suit in the United States District Court for the Eastern District of Wisconsin. Generically alleging a Section 1983 violation of his constitutional rights and a state law claim for defamation, Schlessinger sued the Town of Geneva, the Town Board, members of the Board, the Geneva Police Department, Officer George Salimes, Edward Gritzner, Anthony's Steakhouse and its owner.

In June of 1995, the Police Department respondents moved for summary judgment. In deciding the Department's motion, the District Court ruled that Schlessinger failed to establish that the threat of arrest, the very basis of his constitutional claim, was unreasonable. (A. 17). With dismissal of the Section 1983 claim, the court further concluded that Schlessinger's state law claims required dismissal as "no reasonable jury" could find that Schlessinger's damages exceeded the requisite jurisdictional amount of $50,000.00. (A. 19).

In March of 1996, Schlessinger filed his notice of appeal of the District Court's decision with the Seventh Circuit Court of Appeals. Simultaneously, Schlessinger filed a Rule 60(b) motion for reconsideration in the District Court. On May 29, 1996, the District Court denied the motion to reconsider and on June 26, 1996 he filed a notice of appeal of the District Court's order. Schlessinger's appeals were consolidated by order dated July 10, 1996.

Following oral arguments, the Seventh Circuit affirmed the decision of the District Court. (A. 1). In its opinion dated November 15, 1996, the court concluded that Schlessinger's suit "trivialized the constitutional rights he asks us to vindicate." (A. 8). Specifically, the court determined that Schlessinger did not sustain his burden of proof with respect to the jurisdictional

amount in controversy requirement (A. 3-5); and had failed to establish a violation of his constitutional rights by the Geneva Police Department. (A. 5-7). Determining the appeal was "even weaker" than the original complaint (A. 8), the court directed Schlessinger and his attorney to show cause why they should not be penalized for pursing a frivolous appeal. (A. 8).

Following its review of materials submitted by Schlessinger and his attorney (A. 20-33), the Seventh Circuit concluded that the responses filed ignored the numerous legal deficiencies in the appeal and constituted nothing more than an attempt to reargue the factual basis for the underlying complaint. (A. 10). Determining the appeal had no chance of success, the Seventh Circuit ordered Schlessinger and his attorney to reimburse the respondents for the legal expenses associated with the appeal. (A. 10).

On February 13, 1997, Schlessinger attempted to file his Petition for Writ of Certiorari. On February 18, 1997, the Office of the Clerk notified Schlessinger of numerous deficiencies with the Petition and gave Schlessinger 60 days to comply with the Rules of the Supreme Court. Schlessinger's Petition was docketed on April 22, 1997.

B. Factual Background

Respondents agree that Schlessinger has correctly set forth the facts as determined by the District Court when deciding summary judgment. However, Schlessinger has omitted facts relied on by the Seventh Circuit in its *de novo* review of this matter.

With respect to the January 8, 1994 incident, the Seventh Circuit determined that Officer Salimes threatened arrest on alternative grounds; theft of services and disorderly conduct.

(A. 7). The court also concluded that given the uncontested evidence that Schlessinger was loud and obnoxious and disturbing other patrons, there was no dispute that Schlessinger was in fact disorderly. (A. 7).

As to the potential liability of the municipal defendants, the court noted that Schlessinger did not even try to identify an unconstitutional policy, practice or procedure purportedly adopted by the Town or the Police Department. (A. 5). Similarly, the court found Schlessinger never attempted to articulate a theory of liability against the Chief of Police or Board Chairman. (A. 5).

Regarding the amount in controversy issue, the Seventh Circuit observed that Schlessinger endeavored to meet his burden of proof by attaching two newspaper articles to his brief. (A. 4). The court identified the articles as discussing statutory damage caps and a plaintiff's recovery in an employment related suit. The court correctly determined that neither article was remotely probative to the issues in this case. (A. 4).

REASONS FOR DENYING THE WRIT

This civil rights lawsuit was filed against George Salimes ("Officer Salimes"), and others by petitioner David Schlessinger ("Schlessinger"), because Schlessinger believed that he should not have been asked to pay for a steak he ordered in a restaurant. Schlessinger seeks review of the lower court's determination that Officer Salimes was entitled to qualified immunity, but focuses almost entirely on the Seventh Circuit Court of Appeals' alleged erroneous failure to address the lower court's holding, and ignores the alternative ground upon which the Seventh Circuit affirmed judgment for Salimes (and the others). Schlessinger also asks this Court to review the Seventh Circuit's imposition of sanctions on Schlessinger (and his attorney) for

proceeding with a frivolous appeal. Neither of these issues provides a compelling basis for the Court to exercise its discretion to grant the Petition for Certiorari, particularly as Schlessinger's request is based upon a misapprehension of procedural principles and the substantive law. Furthermore, the analysis contemplated by Schlessinger would be fact intensive and the Court's decision would have little application outside the confines of this case. Finally, the decisions of both the Court of Appeals and the District Court turned on questions of state law, the review of which will not support a grant of certiorari.

I.

THE SEVENTH CIRCUIT COURT OF APPEALS PROPERLY AFFIRMED THE DISTRICT COURT'S JUDGMENT OF DISMISSAL ON ALTERNATIVE GROUNDS.

Holding that the undisputed facts demonstrated that Officer Salimes did not violate Schlessinger's constitutional rights, the Seventh Circuit declined to address the question of whether the doctrine of qualified immunity was implicated. The Seventh Circuit concluded that because Schlessinger could have been arrested for disorderly conduct, "Officer Salimes' threat to arrest Schlessinger . . . was proper." (A. 7). Where an appellant may defend a judgment on any ground supported by the record, it is axiomatic that the court on appeal may affirm on those alternative grounds. *See Bennett v. Spear*, __ U.S. __, 117 S. Ct. 1154, 1163 (1997). Schlessinger correctly notes that the standard for review of summary judgment is *de novo* (Pet. 11), thereby lending further support to the Seventh Circuit's discretionary decision to evaluate the record and affirm the judgment on the legal grounds *it* deemed appropriate. The district court's conclusions of law are not binding on the circuit court, and the appellate court owes no deference to the trial court's conclusions. *Salve Regina College v. Russell*, 499 U.S. 225, 238 (1991).

Schlessinger's invocation of *Elder v. Holloway*, 510 U.S. 510 (1994), for the proposition that the Seventh Circuit was *required* to address the issue of qualified immunity, is inapposite. In *Elder*, the Court held that "[a] court engaging in review of a qualified immunity judgment should . . . use its 'full knowledge of its own [and other relevant] precedents.' " 510 U.S. at 516 (citation omitted). In the current case, the Seventh Circuit explicitly declined to "dwell on the immunity question." (A. 7). Contrary to Schellinger's suggestion, *Elder* simply does not require the Court to independently seek and review all cases related to qualified immunity if it does not engage in a qualified immunity analysis. Rather, once the court decides that a particular constitutional issue is implicated, cases bearing on an official's entitlement to qualified immunity can, and must be, considered as they come to the attention of the court — whether raised by the parties or not. In the present case, the Seventh Circuit's conclusion that Schlessinger's rights had not been violated renders any analysis regarding qualified immunity unnecessary. Thus, no such duty arises.

II.

SCHLESSINGER'S ACTIONS GAVE OFFICER SALIMES PROBABLE CAUSE TO ARREST HIM.

A.

Summoned to the restaurant by Schlessinger himself, Officer Salimes was confronted with allegations that Schlessinger's loud, obnoxious behavior was disturbing patrons of the restaurant; Officer Salimes observed the same upon his arrival. (A. 7). Schlessinger never disputed that characterization of his behavior. (A. 7).

Under the circumstances, the Seventh Circuit correctly

concluded that irrespective of probable cause to arrest for theft of services (*i.e.*, fraud on an innkeeper), Schlessinger could have been arrested for disorderly conduct. (A. 7). Section 947.01, Wisconsin Statutes, provides:

> Disorderly conduct. Whoever, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of a Class B misdemeanor.

Schlessinger's actions provided probable cause for arrest under those provisions. Under the circumstances, Officer Salimes' threat to arrest him was perfectly appropriate. Schlessinger's claim that he was threatened with arrest "where there [was] not a violation of the law" (Pet. at i), is simply not borne out by the undisputed facts.

B.

Significantly, Schlessinger's refusal to pay for the food he (and his buddies) ordered and partially consumed (A. 15), gave Officer Salimes probable cause under state law to arrest Schlessinger for fraud on an innkeeper. Amazingly, Schlessinger attempts to package and sell this case to the Court as a "consumer dispute[ ] regarding products and services." (Pet. 9). Certainly Schlessinger was a "consumer" of products and services, so are shoplifters. Indeed, Schlessinger's implicit concession that he did "consume" products which he then refused to pay for is *prima facie* evidence that he violated the law. Officer Salimes' threat to arrest Schlessinger for reported and perceived actions which violate criminal statutes does not render Officer Salimes' actions unconstitutional, and certainly does not warrant review by this Court.

1.

Schlessinger continues to attempt to raise an argument he waived by failing to assert it in the context of the summary judgment proceedings before the District Court, suggesting that Wis. Stat. § 943.21 (the fraud on an innkeeper statute), is inapplicable, because "there was no secrecy" in his actions. (Pet. 19).

The Court has long held that in order to be reviewable on appeal, a claim or issue must have been "pressed or passed upon below." *United States v. Williams,* 504 U.S. 36, 40 (1992). Where Schlessinger never raised this argument in the context of the summary judgment proceedings, he waived it.

2.

Even if the Court would entertain Schlessinger's belated argument, the relevant statute supports the actions taken by Officer Salimes. There is simply no requirement that a customer be acting with "secrecy" before he may be deemed to have committed fraud on an innkeeper. Refusal to pay for food ordered will give rise to charge of fraud on an innkeeper. Section 943.21 of the Wisconsin Statutes provides:

> 943.21 Fraud on hotel or restaurant keeper.
>
> (1) Whoever does either of the following may be penalized as provided in sub. (3):
>
> (a) Having obtained any beverage, food, lodging or other service or accommodation at any campground, hotel, motel, boarding or lodging

> house, or restaurant, intentionally absconds without paying for it.[1]

The statute further provides that refusal to pay for the check when presented is *prima facie* evidence of intent to defraud. Section 943.21(2)(b) provides:

> (2) Under this section, prima facie evidence of an intent to defraud is shown by:
>
> * * *
>
> (b) The failure or refusal of any guest at a . . . restaurant, to pay, upon written demand, the established charge for any beverage, food,

---

1. The Wisconsin Supreme Court defined "absconding" in *State v. Croy*, 145 N.W. 2d 118 (Wis. 1966), quoting from the 1953 report of the Wisconsin Legislative Council as follows:

> Under this section the actor must abscond without paying for the food, lodging or other service. "Abscond" means to depart clandestinely. (Webster's New International Dictionary (2d ed.)). *In the context of this section a person absconds if he departs without the knowledge or consent of the operator of the hotel, motel, boarding house, or restaurant. . . .*

145 N.W. 2d at 120 (emphasis supplied).

Although *Croy* happened to involve absconding through clandestine means, the court never limited the definition to such a factual situation and even contemplated a broader interpretation of Wis. Stat. § 943.21. The legislative council expressly defined "absconding" in the context of § 943.21 to alternatively encompass a person departing *without the consent* of the innkeeper, as well as one departing without the innkeeper's knowledge. *Id.*

> lodging or other service . . . actually rendered.

Schlessinger actually received the food at issue. He may not have been satisfied with the steak, but it actually was served to him. Moreover, he had no complaint about the beverages and appetizers he received. (A. 3). Schlessinger was presented with a check for food and beverages which he refused to pay. He also refused to allow his friends to eat or pay for their dinners, which they found acceptable. (A. 14). On this basis alone, Officer Salimes had probable cause to arrest Schlessinger under Wis. Stat. § 943.21.

As the District Court found, Schlessinger did not prove that Officer Salimes would have been unreasonable in arresting Schlessinger under the facts presented most favorably to petitioner. (A. 18). It cannot be said that Officer Salimes' conduct was wrongful under clearly established law. Indeed, to this day, Schlessinger can provide no legal support whatsoever for his theory that Officer Salimes' threat to arrest him was unreasonable under the circumstances. (Pet. 20). In the absence of such proof, the police department respondents are entitled to qualified immunity.

The doctrine of qualified immunity shields government officials, including law enforcement officers, from liability for civil damages in actions brought pursuant to 42 U.S.C. § 1983 where their conduct does not violate *clearly* established constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). Its purpose is to give such officials the ability to predict when their actions will create liability for them, and provide them with assurance that they "will not be held personally liable as long as their actions are reasonable in light of current American law." *Anderson v. Creighton,* 483 U.S. 635, 646 (1987). This doctrine

is specifically intended to protect "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs,* 475 U.S. 335, 341 (1986).

Here, Officer Salimes' actions were eminently reasonable. His actions certainly did not reflect either incompetence or a violation of any clearly-established law. He simply effectively defused an apparently heated situation in a public restaurant. By Schlessinger's own admission, the "situation" was "escalating." (A. 2). He was disturbing other patrons. (A. 1, 7). The police officers, called to settle a dispute by an angry and disruptive individual, were trying to keep the peace and avoid arresting Schlessinger.

Finally, Schlessinger's claims that Officer Salimes is not entitled to qualified immunity is fatally flawed and belied by his own actions in asking the Seventh Circuit to certify a question regarding the meaning of that statute to the Wisconsin Supreme Court. Specifically, he wondered whether the presumption of an "intent to abscond by failure to pay a bill when due is a valid provision in the overall statutory scheme, or whether it should be stricken." (Appellant Br. at 24-26).

Any review of the constitutionality of Wis. Stat. § 943.21, would have no impact on Officer Salimes' entitlement to qualified immunity. The question regarding immunity is whether, at the time of the Officer Salimes' actions, they violated a clearly established constitutional right. A finding that the statute is unconstitutional after the fact has no bearing on the reasonableness of their actions at the time of the incident, and therefore has no bearing on the issues presented in this case.

III.

THE SEVENTH CIRCUIT PROPERLY EXERCISED ITS DISCRETION WHEN IT SANCTIONED SCHLESSINGER AND HIS COUNSEL.

Schlessinger challenges the Seventh Circuit Court of Appeals' authority and ability to impose sanctions in this matter. His rather obtuse argument appears to rest on the following bases: (1) the Seventh Circuit did not decide the qualified immunity issue correctly; (2) case law does not support sanctions as his appeal was not made in bad faith; (3) the Seventh Circuit did not "use their sound judgment" and any judgment exercised was not based on sound legal principles. Schlessinger's bootstrapped argument, and indeed his entire Petition, is not only without merit, but textbook frivolous as well. This Court should deny this Petition, and, like the Seventh Circuit, find further sanctions appropriate for Schlessinger and Schlessinger's counsel for continuing to pursue this meaningless and maliciously-prosecuted action.

A court of appeals is entitled to impose sanctions, including reasonable damages and costs, in the event it determines an appeal is frivolous. Fed. R. App. P. 38. The court has authority to impose sanctions *sua sponte. Hill v. Norfolk & Western Ry. Co.*, 814 F.2d 1192 (7th Cir. 1987).

Rule 38 has three purposes: (1) to penalize the appellant who takes a frivolous appeal; (2) to compensate the injured party for delay and expense of the appeal, *Burlington Northern R.R. Co. v. Woods*, 480 U.S. 1, 7 (1987); and (3) to deter future frivolous appeals, *Hill v. Norfolk & Western Ry. Co.*, 814 F.2d 1192 (7th Cir. 1987); *Ruderer v. Fines*, 614 F.2d 1128 (7th Cir. 1980).

Rule 38 adopts a case-by-case approach to identifying and deterring frivolous appeals. *Burlington Northern*, 480 U.S. at 8. While the accepted baseline standard for frivolousness is met when the result is obvious, or the arguments are wholly without merit, *Mars Steel Corporation v. Continental Bank, N.A.*, 880 F.2d 928, 938 (7th Cir. 1989) (citing numerous Seventh Circuit cases); *Henry v. Farmer City State Bank*, 808 F.2d 1228 (7th Cir. 1986), courts have also found sanctions appropriate in the following circumstances:

(1) the briefs or arguments attempt to address the issues, but:

(a) cite no legal authority, *Hilgeford v. People's Bank*, 776 F.2d 176 (7th Cir. 1985), *cert. denied*, 475 U.S. 1123 (1986); *In re Grand Jury Proceedings*, 787 F.2d 778 (1st Cir. 1986);

(b) cite only irrelevant or inapplicable authority, *Chalfy v. Turoff*, 804 F.2d 20 (2d Cir. 1986); *Brady v. Chemical Constr. Corp.*, 740 F.2d 195 (2d Cir. 1984);

(c) make unsubstantiated factual assertions or bare legal conclusions, *Hambler v. County of Los Angeles*, 803 F.2d 462 (9th Cir. 1986); *McGoldrick Oil Co. v. Campbell, Athey & Zukowski*, 793 F.2d 649 (5th Cir. 1986);

(2) the appellant fails to distinguish or even mention relevant precedent, *Smith v. Blue Cross & Blue Shield*, 959 F.2d 655 (7th Cir. 1992); *Tyson v. Jones & Laughlin Steel Corp.*, 958 F.2d 756 (7th Cir. 1992), or fails to make an argument for a change in the law, *In re Hendrix*, 987 F.2d 195 (7th Cir. 1993);

(3) the appellant asserts that dispositive authority was

wrongly decided, *Des Vignes v. Department of Transportation*, 791 F.2d 142 (Fed. Cir.), *cert. denied*, 479 U.S. 853 (1986);

(4) The appellant asserts issues not raised in the trial court and therefore not preserved for appeal, *Bailey v. Bicknell Minerals, Inc.*, 819 F.2d 690 (7th Cir. 1987); *see also La Amiga del Pueblo, Inc. v. Robles*, 937 F.2d 689 (1st Cir. 1991); *Transnational Corp. v. Rodio & Ursillo, Ltd.*, 920 F.2d 1066 (1st Cir. 1990).

Schlessinger's Seventh Circuit appeal and even the present Petition, satisfy most of these "frivolous criteria."

First, the Court of Appeals followed correct procedure and properly affirmed the dismissal on the qualified immunity issue. Initially, the court concluded that summary judgment was warranted as Schlessinger failed to meet his burden to demonstrate a constitutional violation, a prerequisite to breaching the qualified immunity defense. (A. 6-7). Next, the court rejected Schlessinger's demand to send immunity questions to juries, which demand was based solely on unsubstantiated, bald legal conclusions devoid of any mention or discussion or dispositive Seventh Circuit decisions, including *Rakovich v. Wade*, 850 F.2d 1180, 1201-02 (7th Cir. 1988) (en banc), and this Court's decisions, including *Hunter v. Bryant*, 502 U.S. 224, 227 (1991); and *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). (A. 6-7, 9). Petitioner's argument implicitly attacked the validity of this dispositive case law without any cogent argument for a change in that law. (A. 7).

Second, Schlessinger sued numerous defendants, but failed to inform the courts below how those defendants could be liable. (A. 2-3). Regarding Officer Salimes, Schlessinger failed to demonstrate to the District Court on summary judgment either

(1) that his seizure, if one existed, was unreasonable and therefore unlawful, or (2) that any case law illustrated that Officer Salimes' conduct was unlawful. (A. 18-19). Regarding the other defendants, such as the town board and the town chairman, Schlessinger asserted they were indifferent to his rights; yet, the Court of Appeals held that such indifference did not create liability. (A. 3). Clearly, his claims against those defendants were wholly without merit and doomed from the start. Similarly, Schlessinger never articulated a theory of liability for the police chief, the town board chairman, and the other like defendants. (A. 5). "What the Town's unconstitutional 'policy' might be remains a mystery." (A. 5). Again, Schlessinger simply drew bare, unsubstantiated legal conclusions of legal liability, without any supporting case law.

Third, on summary judgment, Petitioner failed to sustain his burden of proof regarding the minimum amount in controversy for diversity jurisdiction, resulting in dismissal of all of his remaining state law claims. (A. 3-4, 19). The Seventh Circuit noted that Petitioner "did not cite in the district court a single case addressing that subject, or any other theory of damages." (A. 4). Moreover, on appeal, the Seventh Circuit noted that Petitioner failed to preserve the issue for appeal and rejected his attempt to establish the jurisdictional minimum amount via newspaper articles, as opposed to Wisconsin case law on damages. (A. 4). "No argument based on Wisconsin law has been preserved, so this appeal was doomed." (A. 4).

Additionally, Schlessinger erroneously and frivolously claims that this Court should grant this Petition and reverse the sanctions order because this case was brought in good faith. Together with other circuits, the Seventh Circuit has expressly rejected the notion that good faith, or conversely, the lack of bad faith, protects an appellant from Rule 38 sanctions. *See Hill v. Norfolk & Western Ry. Co.*, 814 F.2d 1192 (7th Cir. 1987)

(proof of misconduct provides an additional basis for sanctions under Rule 38, but is not a prerequisite); *Bacon v. American Federation of State Employees Council 13,* 795 F.2d 33 (7th Cir. 1986) (no need for Court of Appeals to determine whether appellant thought appeal could succeed); *see also In re Perry,* 918 F.2d 931 (Fed. Cir. 1990) (good faith, but unreasonable, beliefs, and favorable reputation of attorney were irrelevant to the sanctions determination); *Braley v. Campbell,* 832 F.2d 1504 (10th Cir. 1987) (express rejection of appellant's contention that subjective bad faith was standard for Rule 38 sanctions); *Sun Ship, Inc. v. Matson Navigation Co.,* 785 F.2d 59, 64 (3d Cir. 1986) (Rule 38 focuses on the merits of the appeal regardless of good or bad faith); *Johnson v. Allyn & Bacon, Inc.,* 731 F.2d 64 (1st Cir.), *cert. denied,* 469 U.S. 1018 (1984) (court may award costs and fees even if appeal was not taken in subjective bad faith).

Schlessinger's self-serving statement that the appeal was undertaken in good faith does not shield him or his attorney from sanctions under Rule 38. The only recognized analysis is whether or not the appeal is objectively frivolous. Petitioner and his attorney should know, based upon a cursory review of the law, that this good faith argument is without merit. Once again, Petitioner and his attorney advance loopy, unsubstantiated legal arguments, which fly in the face of controlling precedent.

IV.

PETITIONER'S CLAIMS OF EMBROILMENT AND LACK OF DUE PROCESS ARE NOT ONLY MERITLESS, BUT FRIVOLOUS, WARRANTING THE IMPOSITION OF SANCTIONS.

Schlessinger and his counsel not only continue to clog the federal court system with this meritless litigation, but they also

advance new, frivolous arguments — this time aimed at the Seventh Circuit. Schlessinger claims that not only did the Seventh Circuit become "embroiled" in this litigation, but that it also deprived him of due process during the appeal and sanctions process. (Pet. 22-24).

Schlessinger's claim of embroilment is not only inaccurate, but is a halfbaked personal attack on the Seventh Circuit Court of Appeals. Again, Petitioner blatantly ignores and fails to develop dispositive case law. Petitioner fails to note that in *Taylor v. Hayes*, 418 U.S. 488 (1974), this Court was concerned with the embroilment of a trial court judge whose negative bias towards the petitioner was demonstrated in the presence of the jury during a murder trial. Those jury concerns are not present in an appeal.

Clearly, the Seventh Circuit dealt with Petitioner's appeal in a manner which did not mince words. Its opinion showed the court's disgust with this frivolous overdone litigation. In fact, petitioner's assertion is ludicrous in that he would apparently accede to the sanctions so long as the Seventh Circuit "spanked" him with nice, kind words. A Court of Appeals, however, is not so shackled in its role as guardian over its docket. While the court's opinion undoubtedly hurt Schlesinger's feelings, the court's frank analysis of this appeal does not render the court's decision a violation of due process. If anything, it sends a strong straightforward message to appellants who equate an appeal of right with a right to appeal anything.

Schlessinger's claim of due process violation with respect to the sanctions process is also frivolous and simply without merit. The Seventh Circuit may award sanctions for a frivolous appeal after notice from the court and reasonable opportunity to respond. Fed. R. App. P. 38. Such notice corresponds to the basic principles of notice and opportunity to be heard. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980).

In this case, due process is satisfied as Schlessinger was clearly given notice of the impending sanctions and an opportunity to respond. The Seventh Circuit required Petitioner and his attorney to show cause, within 14 days, why they should not be sanctioned under Fed. R. App. P. 38 and Circuit Rule 38 for pursuing a frivolous appeal. (A. 8). Subsequently, Petitioner's counsel filed an affidavit in response to the order to show cause. (A. 20-33). The Seventh Circuit thereafter issued an order which concluded that the appeal was indeed frivolous and which directed respondents to file statements of expenses reasonably incurred. (A. 9-10). Respondents submitted affidavits from their respective counsel, to which Petitioner's counsel filed an affidavit seeking a breakdown of "legal hours." (A. 34-36). Upon review of the affidavits filed, the Seventh Circuit issued its order imposing sanctions against Petitioner and his attorney Andrew J. Shaw. Petitioner received all the process he was due.

CONCLUSION

The writ of certiorari should be denied. Additionally, the respondents respectfully request that this Court impose sanctions on Petitioner, pursuant to Supreme Court Rule 42(2.), and double costs, pursuant to Supreme Court Rule 43(7.).

Respectfully submitted,

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